No. 10-222

In the Supreme Court of the United States

WYETH LLC, ET AL., PETITIONERS

v.

SANDRA KIRKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

KANNON K. SHANMUGAM
Counsel of Record
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

(additional counsel on inside cover)

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street,
Suite 1900
Cincinnati, OH 45202

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REPLY BRIEF FOR THE PETITIONERS

This case is an unusual one because it involves a question of enormous practical importance that will ordinarily evade the Court's review. In the decision below, the court of appeals held that the doctrine of "fraudulent misjoinder" is applicable only where the misjoinder was "egregious." That holding is erroneous; it conflicts with the holdings of numerous lower courts; and it would render the doctrine of fraudulent misjoinder a virtual nullity and undermine the important interests the doctrine serves. And because of the statutory limitation on appellate jurisdiction over remand decisions, it is rare for a case presenting the question presented here to reach a court of appeals, much less this Court; indeed, this case is before the Court only because of an oddity that allowed the district court to render final judgment.

In their brief in opposition, respondents primarily contend that, because the district court has since remanded the underlying lawsuits to state court, this Court is somehow disempowered to review the court of appeals' decision. The Court, however, has routinely granted review in cases in precisely the same procedural posture. Respondents' only other contention is that this Court should not grant review in the absence of a square circuit conflict. But the lack of such a conflict should not be a substantial consideration here because of the difficulty in obtaining appellate review. As the amicus briefs of PhRMA and DRI explain, the question presented in this case is an exceptionally important one. The Court should take this rare opportunity to address the validity and scope of the fraudulent-misjoinder doctrine, and grant review of the Eighth Circuit's erroneous decision.

A. Because This Case Is Not Moot, It Is An Optimal Vehicle For Consideration Of The Question Presented

Respondents first contend (Br. in Opp. 3-6) that, because the district court has remanded the underlying lawsuits to state court, this Court lacks jurisdiction and the case is moot. That contention is wholly without merit.

1. As an initial matter, this Court considered, and rejected, a materially identical contention in *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464 (1947). In that case, as in this one, the court of appeals held that removal was improper, and ordered the district court to remand the case to state court, because the defendant had failed to satisfy the requirements of diversity jurisdiction. *Id.* at 466.

This Court granted certiorari and unanimously reversed. 330 U.S. at 468. Notably, in so doing, the Court rejected the contentions, first, that "a decision of a Cir-

cuit Court of Appeals ordering remand of a case to a state court is not reviewable," and second, "that we lack power to review the action of the Circuit Court of Appeals[] since the mandate of that court has issued and the District Court has remanded the cause to the state court." *Id.* at 466. The Court reasoned that the predecessor to 28 U.S.C. 1447(d), which (like the current version) prohibited review by a court of appeals of a district court's remand order, did not "affect[] our authority to review an action of the Circuit Court of Appeals[] directing a remand to a state court." 330 U.S. at 467 (citations omitted). The Court added that "the fact that the mandate of the Circuit Court of Appeals has issued [does not] defeat this Court's jurisdiction." *Ibid.* (citation omitted).

Since its decision in *Aetna*, this Court has repeatedly granted certiorari in the circumstances presented here: *i.e.*, where a court of appeals has reversed a district court's order denying remand and, pursuant to the court of appeals' mandate, the district court has already remanded the case to state court. See, *e.g.*, *Lincoln Property Co.* v. *Roche*, 546 U.S. 81 (2005); *Dole Food Co* v. *Patrickson*, 538 U.S. 468 (2003); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996). In all of those cases except *Dole Food*, moreover, the Court subsequently reversed the judgment of the court of appeals. In the wake of *Aetna* and those cases, therefore, it is well established that, "if the court of appeals holds that a case was not removed properly, so the denial of remand was erroneous, and orders remand," the court of appeals' decision "may be considered by the Supreme Court." 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice and Procedure* § 3740, at 1033 (4th ed. 2009).

2. Respondents entirely ignore that line of authority. Instead, respondents chastise petitioners (Br. in Opp. 5) for failing to seek a stay of the court of appeals' mandate. As the foregoing authority makes clear, however, it was simply unnecessary for petitioners to do so before seeking review from this Court. Indeed, in *Lincoln Property*, this Court granted review although the court of appeals had *denied* a motion to stay the mandate—and the mandate had accordingly issued. See Order Denying Mot. to Stay Mandate, *Roche* v. *Lincoln Property Co.*, No. 03-2064 (4th Cir. Aug. 4, 2004); Mandate, *Roche*, *supra* (4th Cir. Aug. 12, 2004).

In cases not subject to the generally applicable prohibition on appellate review in 28 U.S.C. 1447(d), moreover, courts of appeals have routinely reversed district courts' remand orders even where the order at issue had not been stayed pending appeal (and, as a result, the remand had already occurred). See, *e.g.*, *Williams* v. *Beemiller, Inc.*, 527 F.3d 259 (2d Cir. 2008); *In re FMC Corp Packaging Systems Division*, 208 F.3d 445 (3d Cir. 2000); *Ellenburg* v. *Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008); *Brookshire Bros. Holding, Inc.* v. *Dayco Products, Inc.*, 554 F.3d 595 (5th Cir.), cert. denied, 129 S. Ct. 2865 (2009); *Osborn* v. *Haley*, 422 F.3d 359 (6th Cir. 2005), aff'd, 549 U.S. 225 (2007); *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994); *Xiong* v. *Minnesota*, 195 F.3d 424 (8th Cir. 1999); *Garamendi* v. *Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), aff'd sub nom. *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996); *Whole Health Chiropractic & Wellness, Inc.* v. *Humana Medical Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001). In fact, this Court granted certiorari, and affirmed, in two of those cases. See *Osborn*, *supra*; *Quackenbush*, *supra*. Those cases contradict re-

spondents' contention that, absent a stay, further review of a decision ordering a remand is unavailable.

In a similar vein, respondents contend (Br. in Opp. 1) that "a reversal of the Eighth Circuit's decision could not provide any effectual relief to petitioners." If that were the case, all of the above-cited decisions both from this Court and from the courts of appeals would have been an empty exercise. And in answer to respondents' artful contention (Br. in Opp. 4) that "petitioners offer no procedural mechanism by which the district court could now reassert jurisdiction," those decisions make clear that there are numerous means by which a remanded case may be returned to federal court—most commonly, through an order directing the district court to recall or vacate its earlier remand order and reinstate the case to its docket. See, *e.g.*, *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1190 (11th Cir. 1995), vacated after settlement, 102 F.3d 1577 (1996); *Continental Casualty*, 29 F.3d at 295; *Air-Shields, Inc.* v. *Fullam*, 891 F.2d 63, 66 (3d Cir. 1989). Respondents offer no valid reason why the lower courts could not do the same here in the event this Court reverses the court of appeals' judgment.

3. What little authority respondents do cite (Br. in Opp. 4-5) stands only for the discrete propositions that, once the district court has issued its remand order, a district court may not *reconsider* its decision, see *New Orleans Public Service, Inc.* v. *Majoue*, 802 F.2d 166, 167 (5th Cir. 1986); *In re La Providencia Development Corp.*, 406 F.2d 251, 252 (1st Cir. 1969), or entertain a motion for leave to file an amended notice of removal, see *Hunt* v. *Acromed Corp*, 961 F.2d 1079, 1081-1082 (3d Cir. 1992). None of those cases addresses the situation presented here, where an appellate court *reverses* a decision to order a remand. Because a uniform line of authority makes clear both that this Court possesses juris-

diction to review the court of appeals' decision and that the case is not moot even though the district court has ordered a remand, there is no obstacle to the Court's granting review here—as it has repeatedly done in cases in a similar procedural posture.

B. The Lower Courts Are In Disarray On The Validity And Scope Of The Doctrine Of Fraudulent Misjoinder

Respondents concede that the lower courts are divided on the issue whether, under the fraudulent-misjoinder doctrine, improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of "egregiousness" (as, indeed, they are on the broader issue whether fraudulent joinder is a basis for federal jurisdiction at all). Respondents nevertheless contend (Br. in Opp. 6-10) that the resulting disarray does not warrant this Court's intervention. That contention lacks merit.

1. To begin with, respondents argue (Br. in Opp. 6-8) that this Court should not grant review because there is no square conflict among the courts of appeals concerning the validity or scope of the fraudulent-misjoinder doctrine. As explained in the petition, however, the absence of a square circuit conflict should not be a substantial consideration here because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder. See Pet. 11-13. Respondents do not dispute that, if a district court concludes that the fraudulent-misjoinder doctrine does not apply and remands to state court on that basis, there will be no opportunity for appellate review. See 28 U.S.C. 1447(d). Nor do respondents dispute that, if a district court concludes that the fraudulent-misjoinder doctrine *does* apply, the resulting order denying remand will not be immediately appealable unless the stringent requirements for interlocutory

certification are met. See 28 U.S.C. 1292(b). As a result, it is exceedingly rare for courts of appeals to have the opportunity to provide guidance to district courts on issues concerning the validity and scope of the fraudulent-misjoinder doctrine—much less for this Court to do so.

Respondents contend (Br. in Opp. 8) that "this case illustrates [that] appellate review is available" on issues concerning the fraudulent-misjoinder doctrine. To the contrary, this case is the exception that proves the rule. The district court's decision not to remand the claims of the diverse plaintiffs to state court would not have been immediately appealable as of right but for the oddity that respondents had *already* brought identical claims in federal court. After it decided not to remand the claims of the diverse plaintiffs, the district court dismissed those claims as duplicative of their already pending claims, thereby rendering its decision final and immediately appealable. See Pet. App. 29a, 35a, 41a.

Put simply, therefore, this case is a jurisdictional fluke. Barring such unusual circumstances, the only way that an issue concerning the fraudulent-misjoinder doctrine could realistically reach a court of appeals is in a case that reaches final judgment in the defendants' favor without first settling—which, in the mass tort context, can take many years. The dearth of court of appeals decisions on issues concerning the fraudulent-misjoinder doctrine, along with the abundance of district court decisions, amply confirms that opportunities for this Court to consider those issues will be few and far between.

Perhaps for similar reasons, this Court has not hesitated to grant review on other issues concerning the validity of removal to federal court even in the absence of a circuit conflict. See, *e.g.*, *Murphy Bros.*, 526 U.S. at 349 & n.2 (citing a "divi[sion]" in the "lower courts" on a question concerning the timing of removal, with two

courts of appeals reaching one conclusion and two district courts reaching another). So too here, given the exceptional practical importance of the question presented, the absence of a clear circuit conflict does not justify denial of the petition.

2. As noted above, respondents do not dispute that the lower courts are divided on the issue whether, under the fraudulent-misjoinder doctrine, improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of "egregiousness." Respondents instead claim (Br. in Opp. 8-10) only that this Court should deny review because the "overwhelming majority" of courts have required "egregiousness" and only a "small minority" of courts have not.

Respondents, however, offer no valid support for that claim. Although one of the cases they cite (Br. in Opp. 9 n.2) does suggest that a "majority" of courts have required "egregiousness," that case actually *rejects* such a requirement and holds that improper joinder is sufficient. See *Greene* v. *Wyeth*, 344 F. Supp. 2d 674, 684, 685 (D. Nev. 2004). Of course, even if respondents' claim were accurate, this Court routinely grants certiorari where the conflict in the lower courts is lopsided—and, indeed, often ends up siding with the court or courts in the minority. See, *e.g.*, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2639 & n.1 (2010); *Bloate* v. *United States*, 130 S. Ct. 1345, 1351 & nn.5-6 (2010); *Georgia* v. *Randolph*, 547 U.S. 103, 108 & n.1 (2006); *Ballard* v. *Commissioner*, 544 U.S. 40, 51-52 (2005); *Demore* v. *Kim*, 538 U.S. 510, 516 (2003); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 601-602 & n.3 (2001). At a minimum, respondents cannot dispute that a substantial number of lower courts have held that improper joinder, without more, is sufficient to trigger application

of the fraudulent-misjoinder doctrine, see Pet. 10-11—and that there is therefore a conflict on which this Court's guidance is warranted.

3. Conspicuously, respondents make no effort to defend the Eighth Circuit's holding that the doctrine of fraudulent misjoinder is applicable only where the misjoinder was "egregious," see Pet. App. 16a, 18a, 19a, much less its further suggestion that the "egregiousness" requirement could be satisfied where the defendant could show that the plaintiffs had "acted in bad faith" in joining the non-diverse claims, see *id.* at 19a. As explained at greater length in the petition, there is no valid justification for an additional "egregiousness" requirement in the context of fraudulent misjoinder, because a court applying that doctrine is not being asked to pass on the merits of the underlying claims. See Pet. 13-14. Such a requirement, moreover, would be extremely difficult to administer, because it is unclear what it means to distinguish "mere" misjoinder from "egregious" misjoinder. See Pet. 14-15. Nor do respondents dispute that the joinder in this case was improper—and therefore that, absent an "egregiousness" requirement, federal jurisdiction over the claims of the diverse plaintiffs would have been appropriate. See Pet. 16-18. Because the choice of the appropriate standard for fraudulent misjoinder would be outcome-dispositive here, this Court should grant review in this case and reject the Eighth Circuit's misguided "misjoinder-plus" approach.

4. Finally, respondents also do not dispute that the question presented in this case is an exceptionally important one. As explained both in the petition and in the amicus briefs of PhRMA and DRI, the fraudulent-misjoinder doctrine is essential to ensure the proper operation of the federal removal and diversity statutes. See Pet. 18-19. And it is particularly essential in the con-

text of multidistrict litigation—whether in the specific context of pharmaceutical litigation or in the context of mass tort litigation more generally—in which plaintiffs often seek to hinder the efficient functioning of the multidistrict litigation statute by pursuing duplicative litigation in state court. See Pet. 19-20.

At bottom, respondents simply fail to answer the case as to why further review is warranted. Particularly given the uncertainty as to when the Court will have another opportunity to consider the question presented here, the Court should grant review in this case to provide much-needed guidance to the lower courts on that question of undisputed significance.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN GLICKSTEIN
ALAN E. ROTHMAN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

WILLIAM HOFFMAN
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

KANNON K. SHANMUGAM
F. LANE HEARD III
GEORGE W. HICKS, JR.
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioners Wyeth LLC, Wyeth Pharmaceuticals Inc., Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn Company LLC, and Greenstone LLC

JOSEPH P. THOMAS
LINDA E. MAICHL
GINA M. SAELINGER
ULMER & BERNE LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

Counsel for Petitioner
Barr Laboratories, Inc.

ALAN R. VICKERY
G. DAWN SHAWGER
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
1717 Main Street,
Suite 5400
Dallas, TX 75201

Counsel for Petitioner
Mead Johnson & Company

JAMES A. O'NEAL
LINDA S. SVITAK
JOHN P. BORGER
AMY R. FITERMAN
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Counsel for Petitioner
Novartis Pharmaceuticals
Corporation

BRIAN A. TROYER
MATTHEW E. LIEBSON
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

Counsel for Petitioner
Solvay Pharmaceuticals,
Inc.

K.C. GREEN
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite
1900
Cincinnati, OH 45202

Counsel for Petitioner
Watson Laboratories, Inc.

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